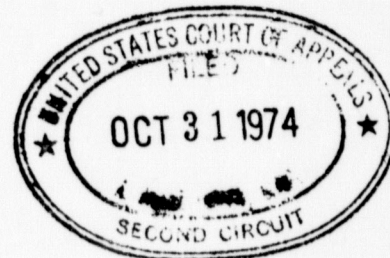


***United States Court of Appeals
for the Second Circuit***



**SUPPLEMENTAL
MEMORANDUM**

74-1550



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

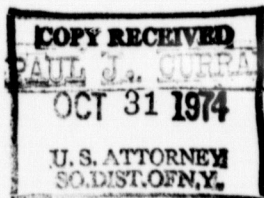
v.

CARMINE TRAMUNTI, LOUIS INGLESE,
DONATO CHRISTIANO, JOSEPH CERIALE,
et al.,

Appellants.
-----X

BPL/s
Docket No. 74-1550

SUPPLEMENTAL MEMORANDUM REGARDING THE HEARING
BEFORE JUDGE BRIANT ON THE MOTION TO SUPPRESS
APPROXIMATELY \$1,000,000



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

UNITED STATES OF AMERICA,

v.

CARMINE TRAMUNTI, et al.,

Appellants.

-----X

SUPPLEMENTAL MEMORANDUM REGARDING THE
HEARING BEFORE JUDGE BRIEANT ON THE
MOTION TO SUPPRESS APPROXIMATELY \$1,000,000

Introduction

During the argument of the appeal in the above-captioned case, the Court requested a supplemental memorandum regarding the hearing presently pending before the Honorable Charles L. Brieant in United States v. Vincent Papa, 74 Cr. 251. This hearing is being conducted on a motion to suppress the same \$1,000,000 that was the subject of the motion to suppress before Judge Duffy, the legality of which is presently before this Court.*

The hearing before Judge Brieant has already revealed new evidence pertinent to the legality of the seizure. Indeed,

* Testimony was taken before Judge Brieant on October 24, 1974, and the hearing is to be continued on November 7, 1974. The minutes of October 24, 1974 are being lodged with this Court along with this memorandum, and the subsequent testimony adduced will immediately be forwarded to this Court when it is transcribed.

almost each and every factor relied upon by Judge Duffy in finding probable cause has been seriously undercut by the new proof adduced at the hearing before Judge Brieant.

Much of the newly-discovered evidence adduced before Judge Brieant comes as a result of a defense subpoena of a log of February 3, 1972. This log purports to be a recording of transmissions to and from 201 Varick Street, which was the Drug Enforcement Administration group's headquarters on the night of February 3, 1972, to the various agents surveilling 1908 Bronxdale Avenue. It is of critical importance to note here that the very existence of this log was denied by Special Agent James Reid at the hearing before Judge Duffy (D392-3)* and that the government allowed his denial to remain uncorrected for more than ten months.

Accordingly, it is the application of the appellants that this Court remand this case to Judge Duffy for further proceedings with regard to the motion to suppress, or, alternatively, that this Court take judicial notice of the proceedings before Judge Brieant and decide the issue in this case on the record made on both hearings below.

A. Judge Duffy's Findings

The court below relied on the following factors in

* References preceded by the letter "D" refer to the proceedings before the Honorable Kevin Duffy in United States v. Tramunti; references preceded by the letter "B" to the proceedings before the Hon. Charles L. Brieant in United States v. Papa.

order to sustain the legality of the search and seizure of February 3, 1972:

(1) Vincent Papa was suspected to be a substantial narcotics violator; (2) Vincent Papa was observed out of his usual haunt, Queens, New York; (3) a suitcase was carried into the building at 1908 Bronxdale Avenue by a person later identified as Joseph DiNapoli in the company of Vincent Papa. Some time later that same individual was seen leaving 1908 Bronxdale Avenue, again with Papa, but this time carrying the suitcase in such a way that it appeared to be heavy; (4) at about 9:00 p.m. a man left 1908 Bronxdale Avenue and drove away in a circuitous manner, leading Special Agent Pallatroni to believe that he was being lured away from the scene of a narcotics transaction; (5) the car driven by Papa was believed to be a leased car. This led Pallatroni to conclude on the basis of his experience that a narcotics transaction was probably occurring because leased or rented cars are frequently used by narcotics dealers.

The combination of all these factors, Judge Duffy held, amounted to probable cause. The new evidence, however, shows that this conclusion was made on an incomplete record, the government agents having concealed the existence of a log which provides documentary proof at odds with much of the police testimony relied upon by Judge Duffy.

B. The New Evidence

1. Papa's "Leased" Car

At the proceedings before Judge Duffy, Pallatroni

testified that he called into headquarters for vehicle registration information regarding the car driven by Papa on the night of February 3, 1972. He claims that he was told some time during that evening, but prior to the seizure of the Papa-DiNapoli vehicle, that the car was registered to World Wide Leasing Corporation (D102). He then testified, on the basis of his substantial experience as a narcotics investigator, that this information was highly significant to him (D102). In fact, twice below Pallatroni described his belief that the Papa car was leased as extremely significant in his decision to order the arrest of the DiNapoli-Papa vehicle (D102, 139). The significance, he claimed, was twofold. First, a car that is leased or rented can be driven by a narcotics offender with the assurance that his identity cannot be readily learned by police officials. Second, in the event of an arrest and seizure of narcotics from a leased car the leased car will be returned to the company that leased or rented it (D102). In other words, while such a car would be forfeited, the government would allow remission. Pallatroni said that on the basis of experience these two factors suggested that when a suspected narcotics violator is seen in a leased or rented car that meant to him that a narcotics transaction was about to occur.

However, as the evidence before Judge Brieant clearly proves, either Pallatroni was suffering from a grave mental delusion, or he lied, because in fact he was never told that the registry of the Papa vehicle indicated that it was leased

or rented. First, as the log of transmissions of February 3, 1972 firmly establishes, the agents in surveillance were told that the Papa vehicle was registered to Wides Auto Sales. Nothing on the log suggests anything about a leased or rented car. Those words simply do not appear. Further, we represent that we will be able to prove at the continuation of the hearing that the records in Albany on the night of February 3, 1972 did in fact show that that particular license plate was registered to Wides Auto Sales. Again, nothing on those records indicates lease or rental. Even beyond this, and most persuasively on this issue, Reilly testified that he also heard the same transmission from headquarters about the registry of the Papa vehicle. And with his recollection refreshed by the log, Reilly testified that the information forwarded to the surveilling agents was Wides Auto Sales and that in fact there was nothing mentioned about leasing or World Wide Leasing or anything to that effect (B130).

The significance of this new knowledge is enormous, for it totally undermines the predicate for Pallatroni's conclusion that the Papa car was being used in a narcotics transaction. Indeed, not only was Pallatroni's assertion about a leased car contradicted by log and agent testimony, but Pallatroni admitted on the hearing before Judge Brieant that the car even bore the word "dealer" on its license plate. When confronted with this fact before Judge Brieant, Pallatroni stated "With the dealer's plate I didn't have an explanation for that." (B224)

The distinction between a leased car and a dealer's car is important in terms of the conclusion Pallatroni said he reached. To begin with, a dealer, like any private person, does not lend his car to anyone off the street; only to someone he knows fairly well. Therefore, any attempt to conceal the identity of the borrower is thwarted by the use of a dealer car, since he can easily be traced. Moreover, a leased or rented car will in fact be remitted by the government, even if used in a narcotics transaction, because a leased or rented car is given to the bailee pursuant to an express written contract, lease or rental agreement. Since the agreement contains a condition that the bailor will not use the car for any unlawful purpose, the lessor will not forfeit the car because the lessee breached the contract. But this is not necessarily the case when a dealer lends a car. See, Calero-Toledo v. Pearson Yacht Leasing Co., ___ U.S. ___, 40 L.Ed. 452, 471-2, fn. 27 (1974). There is no rental or lease agreement, and undoubtedly, there is no express agreement, between the parties such as the one that appears in the lease and/or rental agreement.

But the most eloquent proof of the distinction between leased cars and dealer cars is the simple fact that Pallatroni was forced to admit at the proceedings before Judge Brieant that in his experience as a narcotics officer he did not recall a case of narcotics being seized from a car with dealer plates (B227). This, we submit, says it all. If Pallatroni can reasonably deduce that Papa was engaged in a narcotics transaction because he was driving a leased car, he can do it

only on the basis of his own experience or the knowledge that he has accumulated in his discussions with fellow agents. The new facts, therefore, mandate a conclusion contrary to the one Pallatroni reached. His entire experience argued strenuously against the possibility that a narcotics transaction was being consummated with the use of a dealer plate car. Never before could he recall such a thing happening, notwithstanding his 100 substantial investigations and his 200 arrests in narcotics cases. Thus, Pallatroni's conclusion that a narcotics deal was contemplated is insupportable. It is based on an assumption directly contradicted by the Albany records, the log, his fellow agent's own recollection, and by the objective evidence of the license plate on the car itself.

2. Murray Richmond

At the proceedings below Agent Pallatroni testified that about 9:00 p.m. on February 3, 1972, an unidentified man left 1908 Bronxdale Avenue, got into his car, made a U-turn and proceeded to the Bronx River Parkway South. He exited at some point, got onto the Cross Bronx Expressway and then ultimately drove onto the Bronx River Parkway North (D105-106). Pallatroni concluded that the route taken by this car was "circuitous" and designed to draw away possible agent surveillance from the vicinity of an impending narcotics transaction. At the hearing below the defense established that this unidentified person was in fact Murray Richmond, a lawyer in good standing in this State, that Mr. Richmond had been visiting a client at 1908 Bronxdale

Avenue and that he left and drove in a noncircuitous manner considering his ultimate destination which was another client's house in the Bronx (D189-196).

Since the objective facts show that the agents' conclusion that the car they followed was a decoy was wrong, it obviously becomes important to know when the agents first learned the identity of the driver. Certainly if they knew prior to the arrest of Papa and DiNapoli that this car belonged to Murray Richmond and that Murray Richmond was a lawyer who was likely to be there on legitimate business, the agents could hardly conclude that he would participate in a plan to draw the police away from an impending narcotics transaction.

In this regard, the proceedings before Judge Brieant adduced the following evidence: First, the log of communications for February 3, 1972 shows that at 9:22 p.m. information was radioed to Patrolman George Reilly that the 176MR New York license plate did in fact belong to a Murray Richmond (B132). Reilly further testified that communications from headquarters to the vehicles in surveillance of 1908 Bronxdale Avenue were in fact heard simultaneously by both cars, in other words, the Pallatroni car and the Reilly car. Furthermore, Reilly testified that prior to February 3, 1972 he knew Murray Richmond as a lawyer for none other than Joseph DiBenedetto whom he said he knew to have been arrested leaving 1908 Bronxdale Avenue in a stolen automobile (B133). Thus, on the night of February 3, 1972, prior to the arrest of DiNapoli and Papa, the agents in

surveillance knew that the car Pallatroni claimed to have been circuitously leading him away from an impending narcotics transaction belonged to Murray Richmond, a lawyer. They could not have reasonably concluded it was a decoy.

Furthermore, other grave inconsistencies in testimony about this incident have now arisen. For instance, in the proceedings before Judge Duffy, Pallatroni testified that the reason he followed this car to begin with was in order to obtain its license plates (D105). In the proceedings before Judge Brieant, Reilly testified that even before Pallatroni began to follow this unidentified car, Reilly had already radioed the license plate number to Pallatroni (B74). This, therefore, directly undercuts Pallatroni's prior testimony as to the reason for following this car. In addition, and of considerable importance in assessing this incident, Agent Pallatroni testified in the proceedings below that he attempted to obtain the registry of the vehicle with the license plate 176MR, but was unable to do so because the computer in Albany had broken down. Counsel represents to this Court that at the continuation of the hearing before Judge Brieant we will be able to prove that the records of repair for the Albany computer with the responsibility for housing and communicating this type of information show that there was no computer breakdown at any time on the evening of February 3, 1972.

Thus, the testimony with regard to this incident is now riddled with inconsistency and Agent Pallatroni's original version is highly suspect. Not only do the objective facts fail

to support his claim that he was following a decoy car, but it also appears that there was no reasonable basis for believing that the car was a decoy, since the information known to the agents at the time suggested the contrary.

3. The Suitcase Leaves 1908 Bronxdale Avenue

At the proceedings before Judge Duffy, Patrolman Reilly testified with regard to the manner in which the suitcase which contained the million dollars was carried from 1908 Bronxdale Avenue. It was essentially his assertion, and Judge Duffy found, that the suitcase was carried in such a way that it appeared to be heavy. But whether or not it was heavy, it has become apparent from the hearing before Judge Brieant that Reilly, the only witness to this event, could not or did not make the observation of "heaviness" when the suitcase was carried from the Bronxdale Avenue house. Reilly may have found out the suitcase was heavy once he learned what was inside, but from his account it does not seem possible for him to have reached that conclusion before the arrest.

Reilly's testimony in the hearing now pending before Judge Brieant not only reveals gaping contradictions in his account of the manner in which the suitcase was carried, but also raises serious questions about whether he could possibly have seen what he claims to have seen. Before Judge Duffy, Reilly was initially uncertain about the manner in which the suitcase was carried. When asked specifically whether the suitcase was carried in two hands, Reilly responded "I guess

he was holding it in two hands" (D28). Reilly later demonstrated (D34-35) that it was carried by Joseph DiNapoli with two hands in front of him.

Yet now, before Judge Brieant, Reilly testified that this was not in fact the way the suitcase was carried at all. Now, according to Reilly, it was carried with both hands held to the left side of the body (B115). Moreover, Reilly now acknowledges that it was not DiNapoli whom he originally believed to be carrying the suitcase, but Vincent Papa (B94), although the record before Judge Brieant establishes that DiNapoli is a good five or six inches taller than Papa (B95).

Apparently endeavoring to explain away this difficulty, Reilly now alleges that he could not be sure who was carrying the suitcase, or in what manner it was being carried, until after both DiNapoli and Papa had descended to the bottom of the stoop at the front of 1908 Bronxdale Avenue (B109). It was raining heavily, according to Reilly, when Papa and DiNapoli exited 1908 Bronxdale Avenue (B71). At the time Reilly was seated on the passenger side of an unmarked police car about 100 feet* away from and on the same side of the street as the house at 1908 Bronxdale Avenue.

Yet still other testimony of Reilly washes out this explanation. For he now asserts that at the time DiNapoli and Papa were at the top of the stoop, in an elevated position

* Upon remand, should this Court grant it, we represent that we will be able to prove that the was actually 160 feet from the front steps of 1908 Bronxdale Avenue.

with respect to him, the windshield wipers of the surveillance vehicle in which he was sitting were "on", (B125) thus affording him his clearest possible view of both of them. But by the time Papa and DiNapoli had reached the bottom of the stoop, at the very time when Reilly asserts he was first able to discern who was carrying the suitcase and how it was being carried, he admits that the windshield wipers were "off" (B125). Thus, Reilly claims now to have made his "suitcase observations" from a parked car at a distance of 160 feet, in a driving downpour, at night, through a windshield coated with sheets of rain. At the same time he claims to have been unable to make the same observations from the same distance, at a better viewing angle, with the windshield cleared. His testimony thus strains credulity to the breaking point.

Finally, we will offer to prove before Judge Brieant and, if remand is granted, before Judge Duffy that Vincent Papa and Joseph DiNapoli were given polygraph examinations with regard to the events of February 3, 1972. In these lie-detector tests Joseph DiNapoli was asked whether he carried the suitcase out with two hands and he answered "No", he carried it out with one hand. The polygraph expert will then testify that in his opinion DiNapoli was telling the truth. DiNapoli and Papa when questioned, stated that Papa was walking in front of DiNapoli and could not see how DiNapoli was carrying the suitcase, and that DiNapoli never in fact crossed the street with the suitcase, but rather waited on the 1908 side of Bronxdale Avenue for Papa

to cross the street, get the car, make a U-turn and pick DiNapoli up. The polygraph expert will then testify that in his opinion these statements were truthful.*

Furthermore, evidence uncovered at the Brieant hearing raises a grave question about the honesty and credibility of Agent Pallatroni in this entire matter. Before Judge Duffy, Pallatroni and Reilly squarely contradicted each other with regard to a critical question affecting their credibility -- the custody and control of the suitcase containing the million dollars in cash. Pallatroni testified that after the arrests were made he, Reilly and Papa drove back to 201 Varick Street. During this trip the suitcase was lodged securely in the trunk of Pallatroni's vehicle (D165, 3668-9). Reilly, however, testified that on the way back to 201 Varick Street the suitcase in question was not at all in the trunk, but rather on the back seat of Pallatroni's car together with him [Reilly] and Papa (B101). This discrepancy becomes significant in view of other evidence. Both Pallatroni and Reilly agreed that before returning to 201 Varick Street Pallatroni stopped the automobile and

* It should be pointed out, however, that this offer of proof had been made orally to Judge Brieant in connection with the Papa motion to suppress and while Judge Brieant has not technically ruled on this matter since the formal offer has not as yet been made, Judge Brieant did clearly indicate that he would not receive such testimony. Our position here is, however, that Judge Duffy might, and in fact should, consider this polygraph evidence, particularly in view of the incredible flooding of the agent's testimony with inconsistencies internal and external, and in view of the fact that polygraph testimony, while perhaps properly inadmissible in a jury context, should nevertheless be received for what it is worth by a court sitting as trier of the fact.

directed Reilly and Papa to get out into the rain so that he could make a radio transmission (B102, 219-20), and Pallatroni alleged that he then called base station. The log of the radio transmissions, however, when produced at the hearing before Judge Brieant, shows no such call.

The log thus strongly suggests that Pallatroni was lying when he said he made the call, and that he had some ulterior purpose in ordering Reilly and Papa out of the car. If a fortune in cash was on the back seat, as Reilly testified it was, it takes no great leap of the imagination to guess the ulterior purpose, nor to fathom why Pallatroni later claimed that the suitcase was locked in the trunk. A conclusion that Pallatroni was being less than honest with the Court is, therefore, warranted, not only with respect to his unorthodox behavior once he got control of the money, but also with respect to his entire testimony.

4. 1908 Bronxdale Avenue

During the government's oral presentation before this Court it was claimed that the record of the proceedings before Judge Duffy showed that 1908 Bronxdale Avenue was an address related to narcotics traffic, and indeed, Judge Duffy so held in his opinion affirming the legality of the seizure. However, as the hearing before Judge Brieant indicates, no such conclusion can be realistically drawn from the testimony. The only two references to 1908 Bronxdale Avenue are these. First, that with regard to the Fachiano investigation, Fachiano was observed

speaking to someone in a car belonging to Gene Patalano, who lives at 1908 Bronxdale Avenue. However, there is nothing in the record to suggest that the person in Patalano's car had anything at all to do with narcotics.

Second, Patrolman Reilly testified that he arrested Joseph DiBenedetto who, at the time of his arrest, falsely claimed to have been living at 1908 Bronxdale Avenue. However, DiBenedetto was arrested for driving a stolen vehicle. There is nothing in the record connecting him with narcotics operations.

It is also significant to note that although the agents testified below to having been in the area of 1908 Bronxdale Avenue on some twenty other occasions, no narcotics-related observation is testified to. We respectfully submit that the government is reading the record far too loosely.

5. Papa's "Haunt"

Agent Pallatrone testified and Judge Duffy cited in his opinion, that it was significant that Vincent Papa was seen in the Bronx outside of his usual haunt in Queens. When questioned before Judge Brieant on the Papa hearing, Pallatrone also indicated that if Papa had been seen in Westchester that would have been suspicious and if Papa had been seen in Staten Island that too would have been suspicious, "depending on the circumstances" (B171). Why suspicion would attach solely by virtue of a trip to a nearby county is not explained. Perhaps the police considered Papa a "suspicious person," but a short trip from Queens to the Bronx hardly enhances this belief to any material degree.

CONCLUSION

We respectfully submit that almost every factor upon which Judge Duffy relied in affirming the validity of the seizure on February 3, 1972 is substantially undercut by the proceedings held before Judge Brieant. We submit that Pallatroni could not reasonably infer that Murray Richmond, Joseph DiBenedetto's lawyer, was leading him away from the scene of an impending narcotics transaction. We respectfully submit that Pallatroni was not told the Papa vehicle belonged to a leasing company and could not then infer that a narcotics transactions might be taking place by virtue of his misapprehension of the fact; we respectfully submit that when George Reilly originally testified that he guessed the suitcase was being held in two hands that that was as accurate as anything he ever said in these proceedings. We submit there is no evidence in the record to suggest that 1908 Bronxdale Avenue was, prior to February 3, 1972, known to be connected with narcotics trafficking. It is the position of the appellants that the conclusions reached by Agent Peter Pallatroni, who was the agent responsible for the decision to arrest, were unreasonable and erroneous at best. We further submit that there is a gaping credibility question by virtue of the ultimate disclosure of the log of February 3, 1972 and by the other proof adduced and to be adduced at the hearing before Judge Brieant and at a remand, should the Court order one, before Judge Duffy.

Respectfully submitted,

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